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MONTANA TWENTY-FIRST JUDICIAL DISTRICT COURT,
RAVALLI COUNTY

STATE OF MONTANA, Plaintiff, vs. HARRIS HIMES, Defendant.	Cause No.: DC-11-117 **RESPONSE TO DEFENDANT'S MOTION TO COMPEL PRODUCTION OF SELECTIVE PROSECUTION EVIDENCE**

The State of Montana (State), by and through counsel, responds to the Defendant's Motion to Compel Production of Selective Prosecution Evidence. The motion should be rejected. In the same motion, the Defendant asks for leave from the Court to file an oversized brief, to which the State does not object.[1] The Defendant also asks for an extension of the motions deadline for purposes of filing a motion to dismiss all counts against the Defendant, which the State opposes. The following will show, however, that the question of whether the motions deadline should be extended is moot. The Defendant has not made a sufficient showing that further discovery regarding selective prosecution is warranted, much less that the Defendant has been selectively prosecuted because of his religious beliefs.

[1] The State previously asked for leave from this Court to file this oversized brief.

INTRODUCTION

The Bible states that "for everyone to whom much is given, of him [or her] shall much be required."[2] The State, via the Montana and United States Constitutions, has certainly been given much. It is appropriate and necessary, then, to require much of the State, particularly when it comes to charging citizens with crimes. And while the Montana Supreme Court states that a "prosecutor has broad discretion in determining whether or not to prosecute" (*State v. Lemmon* (1984), 214 Mont. 121, 126, 692 P.2d 455, 457), the prosecutor should do so judiciously pursuant to the evidence as presented.

Here, to put it lightly, the Defendant and his attorneys do not believe the Defendant was charged judiciously. In fact, the Defendant argues that he is being selectively prosecuted due to his "outspoken conservative Christian" beliefs and the "anti-Christian bigotry of the decision-makers in the Auditor's office." (Def.'s Mot. to Compel Production of Selective Prosecution Evidence at 1-5. (September 22, 2012)) These are very serious and troubling allegations, often lacking evidentiary support or a reasonable inquiry,[3] which attack the integrity and motivations of the prosecutors and those who investigated the case. The Defendant and his lawyers base their allegations on the testimony of two former employees of the Auditor's office, but, as shown below, their testimony is often stretched, twisted, and otherwise misconstrued by the Defendant and his attorneys to support their allegations, as the following will reflect.[4] See Exhibit A.

The Defendant would have this Court believe that he was specifically targeted and charged by the State due to his religious beliefs. In other words, the State's prosecutors and investigators are on a crusade against "outspoken conservative Christians" because they are

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[2] Luke 12:48.

[3] See Mont. R. Civ. P. 11(b).

[4] By making repeated misrepresentations to the Court, it is likely that the Defendant's lawyers have violated Rules 3.1(a)(1) and 3.3(a)(1) of the Montana Rules of Professional Conduct.

"bigots" and find devout Christians "particularly repulsive." *Id.* Indeed, the Defendant and his lawyers argue that the State "fabricated" evidence, the investigator perjured herself, and one of the prosecutors needed the Defendant as his "prey" for political purposes.[5] (Def.'s Mot. at 21, 24.) To be sure, according to the Defendant and his lawyers, "one of the greatest injustices that can occur in our legal system" is when a citizen (the Defendant) is selectively prosecuted for expressing opinions "the government deems offensive." (Def.'s Mot. at 32.)

The Defendant and his lawyers conveniently fail to mention, however, how this case was initiated. It was not the State seeking help to pursue the Defendant; instead, it was someone who had trusted and admired the Defendant who turned to the State for help. Exhibit B Depo. G.S. 66:9-15 (May 1, 2012); Exhibit C Depo. Robert Smith 8:25-9:16. Ironically, what the Defendant and his lawyers utterly fail to mention is the fact that the person who sought the State's help is a Christian – a devout Christian. Exhibit B Depo. G.S. 69:25-71:20 (May 1, 2012). He tried to contact the Defendant first. Exhibit F Bates 289-292. When that failed, he called the Ravalli County Sheriff's Office (RCSO). Exhibit C Depo. Robert Smith 8:25-9:16; Exhibit D Depo. G.S. 84:3-17 (May 30, 2012).

PROCEDURAL HISTORY

On May 2, 2009, Deputy Sheriff Robert Smith of the RCSO interviewed G.S., the victim in this case, regarding G.S.'s concerns about the Defendant. Exhibit C Depo. Robert Smith 11:15-17 and 12:11-17. After finishing an initial report, Deputy Smith sent it "down the line" to Lieutenant Potter to assign to a detective because of the "type and size of investigation." *Id.* at 13:11-21. Deputy Smith obtained and included in his report criminal background information on the co-defendant Jeb Bryant but, at his deposition, admitted that it was the wrong report and

[5] See Exhibit A.

pulled a new one. *Id.* at 32:3-8; 45:24-48:14. Aside from the Defendant being a Pastor, nothing in Deputy Smith's records discussed the Defendant's religious beliefs.

The case was assigned to Detective Sergeant Sterling Maus, who spoke with G.S. soon after Deputy Smith did. Exhibit E Depo. Sterling Maus 9:12-21. In July 2009, however, Detective Maus closed the case because he did not hear from G.S. *Id.* at 10:6-9. In January 2011, Detective Maus reopened the case because G.S. contacted the RCSO inquiring about the status of the case. *Id.* at 10:2-3 and 10:9-25. After reviewing G.S.'s documents and speaking with his Lieutenant, Detective Maus forwarded the case on to the State Auditor's office because it appeared to be a securities fraud case. *Id.* at 10:18-25. Detective Maus called Neil Brunett, with whom he previously worked insurance cases, and Mr. Brunett transferred him to Lynne Egan. *Id.* at 11:25-12:6. After speaking with Ms. Egan, Detective Maus transferred the file to her around January 25, 2011. *Id.* 12:3-6 Exhibit 32 attached to his deposition. Aside from the Defendant being a Pastor, nothing in Detective Maus' records discussed the Defendant's religious beliefs.

After conducting her own investigation, Ms. Egan wrote an investigation report dated April 20, 2011. Exhibit F Bates 1-8. As part of her investigation report, she relied on the RCSO for the criminal background information on Mr. Bryant and alleged that the Defendant, among other things, violated the Securities Act of Montana for failing to disclose to the victim the criminal history of Mr. Bryant. Exhibit G Depo. Lynne Egan 123:7-124:13; Exhibit F Bates 6-8. Aside from the Defendant being a Pastor, nothing in Ms. Egan's report discussed the Defendant's religious beliefs. Exhibit F Bates 1-8.

On September 23, 2011, based on the documents provided by G.S. and the investigation, two prosecutors at the Auditor's office filed an Information and Affidavit of Probable Cause

against the Defendant alleging that he committed six felonies. (Mot. and Affidavit for Leave to File Information (September 23, 2011); Information (September 23, 2011).) The Information did not allege that the Defendant violated the Securities Act of Montana for failing to disclose to the victim the criminal history of Mr. Bryant. *Id.* After the Information was filed, certain persons approached the State claiming the Defendant had also offered them securities and, based on this new information, the State filed an Amended Information charging the Defendant with an additional felony. (Mot. and Affidavit for Leave to file Amended Information (November 10, 2011); Amended Information (November 10, 2011).) Nothing in any of the documents filed with the Court even remotely referenced the Defendant's religious beliefs, other than the fact that he and his co-defendant were pastors. *Id.* In fact, no one's religious beliefs were ever discussed until July 31, 2012 – the day Alan Ludwig, a former employee of the State Auditor's office, was deposed. Mr. Ludwig is one of two of the Defendant's alleged "whistleblowers." (Def.'s Mot. at 1.)

STATEMENT OF FACTS

Mr. Ludwig believes that "some of [the] charges [against the Defendant] are relevant I'm sure." Exhibit H Depo. Alan Ludwig 202:7-13. Mr. Ludwig testified that one of the reasons he left the Auditor's office on May 1, 2012, was an anti-Christian bias, although he never told anyone at the office about his concerns except the human resources officer in March 2012. *Id.* at 49:8-16; 90:25-91:8; 181:15-182:2. Specifically, he had concerns about Ms. Egan, although he testified that she never took a negative action toward him because of his faith. *Id.* at 49:14-22; 175:1-10. He also expressed frustration that he "had fallen out of favor with" Ms. Egan or otherwise he'd "still be working [at the office]." *Id.* at 47:3-4. He felt like he was "being excluded from work" during the last year of his employment and "was given dead end matters"

that "didn't leave [him] much purpose." *Id.* at 48:5-16. Mr. Ludwig also testified that he never heard the State Auditor, Monica J. Lindeen, or one of the prosecutors in this case, Jesse Laslovich, make any anti-Christian remarks. *Id.* at 89:4-14. With regard to the other prosecutor in this case, Brett O'Neil, Mr. Ludwig testified that he "didn't know [Mr. O'Neil's] attitudes towards Christians in general," only that Mr. O'Neil, in two comments related to another criminal case the office was prosecuting, had commented about pastors proselytizing. *Id.* at 89:15-90:15. Mr. Ludwig also admitted that he has limited personal knowledge about the Defendant's case. *Id.* at 109:4-110:21; 128:13-129:5; 195:23-196:1; 202:7-21; (See State's Mot. in Limine to Exclude Testimony of Ludwig and Brief in Support (Sept. 26, 2012).)

The other "whistleblower" identified by the Defendant, Roberta Cross Guns, testified that even though she "didn't spend a lot of time with [Mr. O'Neil]," she said Mr. O'Neil called "right wing Christians . . . whack jobs . . . maybe two or three" times. Exhibit I Depo. Roberta Cross Guns 59:6-24. As for the other prosecutor, Mr. Laslovich, Ms. Cross Guns testified that she could not recall if he made any religious-based comments. *Id.* at 59:25-60:9. In fact, she believes Mr. Laslovich is "a practicing Christian" and didn't think he made comments in the office about "people's faith." *Id.* at 60:3-9. Besides Ms. Egan and Mr. Ludwig, Ms. Cross Guns did not "recall others even discussing religion" in the office. *Id.* at 60:10-24. Ms. Cross Guns also admitted that she has no personal knowledge about the Defendant's case. *Id.* at 54:15-22; 88:21-22; (see State's Motion in Limine to Exclude Testimony of Roberta Cross Guns and Brief in Support (Sept. 19, 2012).)

Ms. Cross Guns also expressed concerns about Mr. Laslovich's trial experience. *Id.* at 68:4-5. In contrast, Ms. Cross Guns testified that she has "done lots of trials . . . lots of judge trials . . . lots of jury trials" and that she has "a wealth of experience." *Id.* at 68:7-10. Indeed,

according to Ms. Cross Guns, "I win a lot." *Id.* at 68:11. But Ms. Cross Guns testified that in her 12 years at the Auditor's office, she prosecuted two jury trials, one of which resulted in a directed verdict for the defendant and the other an acquittal. *Id.* at 97:14-99:13.

In addition to his lack of experience, Ms. Cross Guns testified that Mr. Laslovich is "extremely politically motivated," but "feels like [Mr. Laslovich] is willing to say, 'I shouldn't have done that,'" and that he has a "good work ethic." *Id.* at 67:15-16; 69:20-70:5. And even though she "voluntarily" quit her job in January 2012, Ms. Cross Guns felt in "some ways" she was forced out because "in some ways, the way [Mr. Laslovich] treated me was pretty horrible." *Id.* at 110:12-19.

Additionally, according to Ms. Cross Guns, until Mr. Laslovich became Chief Legal Counsel for the Auditor's office, Ms. Egan had significant influence on whether cases were handled criminally. *Id.* at 32:24-33:5. After Mr. Laslovich took over, however, Ms. Cross Guns said she didn't "know what happened" and didn't know "if [Ms. Egan] continued to have a say or not." *Id.* at 33:6-7. Mr. Laslovich started employment with the office in the spring of 2009. Exhibit G Depo. Lynne Egan 119:16-21. Ms. Egan, moreover, testified that the decision of whether a case is handled criminally or administratively is made by "the legal department or the attorney that's going to handle the matter." *Id.* at 40:18-41:5. According to Ms. Egan, if a case is handled administratively or prosecuted criminally, it "would not change the way I investigated the matter at all." *Id.* at 41:5-6. In fact, if Ms. Egan recommends criminal prosecution, the "legal department reaches its own conclusion and does what it sees fit." *Id.* at 47:4-9. As far as her investigations go, "come-clean" letters are "used on a case-by-case basis." *Id.* at 127:15-128:1.

Additionally, Ms. Egan has never investigated someone based on her religious beliefs, their religious beliefs, or their political affiliation. *Id.* at 138:19-139:6. Nor has the Auditor's office pursued someone based on their religious beliefs or political affiliation. *Id.* at 138:13-18. In fact, neither Mr. Ludwig nor Ms. Cross Guns testified that they had seen such actions. Ms. Cross Guns also testified that Ms Egan is "amazingly excellent at identifying where the money goes, following the money. She can do that like nobody I know." Exhibit I Depo. Roberta Cross Guns 108:8-14. To be sure, Ms. Cross Guns trusts that part of Ms. Egan's work. *Id.* at 108:17-18. Mr. Ludwig also testified that Ms. Egan is "very good" at her work and that he trusts her work. Exhibit H Depo. Alan Ludwig 199:6-16.

Importantly, Mr. Ludwig testified that with regard to the Defendant, "it tends to be that people who wind up being involved in these matters are complicit in some matter and some of those charges [against the Defendant] are relevant I'm sure." *Id.* at 202:7-13. Mr. Ludwig's opinion is confirmed by criminal actions initiated by the Auditor's office since Mr. Laslovich began employment with the Auditor's office, all of which have resulted in convictions except those which are still pending, including this one. Exhibit J.

Additionally, since Mr. Laslovich began employment with the Auditor's office, many securities cases have been handled administratively, some have been referred to federal authorities, and others are still in the investigatory stage. Exhibit K. For example, the investigation into Bill Nooney is not complete. Exhibit G Depo. Lynne Egan 116:2-117:7. Additionally, the United States Attorney's office prosecuted Daniel Two Feathers and Rick Young, but decided not to indict Nicholas Cladis. *Id.* at 114:10-115:19; Exhibit I Depo. Roberta Cross Guns 47:21-48:7; Exhibit M Affidavit of Nicholas Cladis, ¶ 5. And in a case Mr. Ludwig

investigated, Ms. Cross Guns filed an administrative action against ACN Corporation. Exhibit G Depo. Lynne Egan 112:20-114:5.

Despite the diversity in the way cases are filed, the Defendant and his lawyers nevertheless argue that the Defendant is being selectively prosecuted. (Def.'s Mot. at 1-2.) For example, Ms. Cross Guns testified that Ms. Egan referred to the Defendant as a "whack job" and a "right-wing Christian," but Ms. Cross Guns never heard Ms. Egan say anything of that nature directly to her. Exhibit I Depo. Roberta Cross Guns 54:23-55:16. Ultimately, no one testified, not even the alleged "whistleblowers," that the Defendant was being prosecuted because of his religious beliefs.

Importantly, Tari Nyland, a current employee of the Auditor's office, stated that in her opinion, the Auditor's office would not investigate, nor would its lawyers prosecute, an individual based on their religious or political beliefs, including the Defendant. Exhibit N Affidavit of Tari Nyland, ¶ 13. The Defendant and his lawyers, however, used Ms. Nyland as an "example" of the "Auditor's office routinely harass[ing] employees who are devout Christians." (Def.'s Mot. at 5.) Ms. Nyland, a devout Christian, was "very hurt and upset" that the Defendant's lawyer did this. Exhibit N Affidavit of Tari Nyland, ¶¶ 9, 11. She was not only "very hurt and upset," she disagrees with the Defendant's lawyer's characterization that the "Auditor's office routinely harasses employees who are devout Christians." *Id.* at ¶¶ 9, 12.

ARGUMENT

I. THE DEFENDANT'S MOTION TO COMPEL SHOULD BE DENIED BECAUSE THE DEFENDANT FAILS TO SHOW THAT HE IS BEING SELECTIVELY PROSECUTED.

According to the Montana Supreme Court, a "prosecutor has broad discretion in determining whether or not to prosecute." *State v. Lemmon*, 214 Mont. 121, 126, 692 P.2d 455,

457 (1984). "Thus, the conscious exercise of some selectivity in the enforcement of criminal laws, without more, does not constitute a violation of constitutional rights." *Lemmon*, 214 Mont. at 126, 692 P.2d at 458; *see also*, *State v. Stanko*, 1998 MT 323, ¶ 51, 292 Mont. 214, 974 P.2d 1139; *State v. Pease*, 227 Mont. 424, 428, 740 P.2d 659, 661 (1987); *State v. Maldonado*, 176 Mont. 322, 328-29, 578 P.2d 296, 300 (1978). "A person asserting that his or her constitutional rights have been violated by selective prosecution must allege and prove that the selection was deliberately based on an unjustifiable standard such as race, religion or other arbitrary classification." *Stanko*, ¶ 51; *Pease*, 227 Mont. at 428, 740 P.2d at 661; *Lemmon*, 214 Mont. at 126, 692 P.2d at 458; *Maldonado*, 176 Mont. at 329, 578 P.2d at 300.

"There is no right under the Constitution to have the law go unenforced against you, even if you are the first person against whom it is enforced, and even if you think (or can prove) that you are not as culpable as some others who have gone unpunished. The law does not need to be enforced everywhere to be legitimately enforced somewhere." *Futernick v. Sumpter Township*, 78 F.3d 1051, 1056-57 (6th Cir. 1996). This is consistent with United States Supreme Court precedent, which states that "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation." *Oyler v. Boles*, 368 U.S. 448, 456 (1962).

The United States Supreme Court, moreover, emphasizes caution when reviewing claims of selective prosecution, stating a prosecutor's "broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review." *Wayte v. United States*, 470 U.S. 598, 607 (1985). The Court explains:

> Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. Judicial supervision in this area, moreover, entails systemic costs of particular concern. Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and

> decision making to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy. All these are substantial concerns that make the courts properly hesitant to examine the decision whether to prosecute. *Wayte*, 470 U.S. at 607-08.

Yet "[i]t is appropriate to judge selective prosecution claims according to ordinary equal protection standards." *Wayte*, 470 U.S. at 608.

The seminal case analyzing these equal protection standards is *United States v. Armstrong*, 517 U.S. 456 (1996). "A defendant claiming selective prosecution must demonstrate "that the . . . prosecutorial policy had a discriminatory effect and that it was motivated by a discriminatory purpose" or intent. *Armstrong*, 517 U.S. at 465 (internal quotation marks omitted). In other words, "[i]n order to dispel the presumption that a prosecutor has not violated equal protection, a criminal defendant must present clear evidence to the contrary," demonstrating that the government was motivated by a discriminatory purpose to adopt a prosecutorial policy with a discriminatory effect. *Id.* (internal quotations omitted).

To be sure, "the standard [for proving a selective prosecution claim] is a demanding one." *Id.* at 463. Accordingly, "the presumption of regularity supports . . . prosecutorial decisions and, in the absence of clear evidence to the contrary, courts presume that [prosecutors] have properly discharged their official duties." *Id.* at 464 (internal brackets and quotation marks omitted). This "presumption of regularity should not be lightly discarded." *United States v. Lewis*, 517 F.3d 20, 25 (1st Cir. Mass. 2008). "It is, therefore, unsurprising that the presumption is formidable; it can be overcome only by a proffer of 'clear evidence' that the prosecutor acted impermissibly in pursuing a case." *Id.*, citing *Armstrong*, 517 U.S. at 465 (Emphasis added).

The Defendant and his lawyers state that he is only required to show "some" evidence of discriminatory effect and discriminatory intent, but they completely fail to provide this Court

with the standard to prove both discriminatory effect and discriminatory intent.[6] (Def.'s Mot. at 17-18.) Indeed, the standard for obtaining discovery in support of a selective prosecution claim is "rigorous" and "only slightly lower than for a dismissal" of the charges. *Armstrong*, 517 U.S. at 468; *United States v. Venable*, 666 F.3d 893, 900 (4th Cir. Va. 2012). "The evidentiary threshold that a defendant must cross in order to obtain discovery in aid of a selective prosecution claim is somewhat below 'clear evidence,' but it is nonetheless fairly high." *Id.*, citing *Armstrong*, 517 U.S. at 468. "To cross this lower threshold, a defendant must present 'some evidence' tending to show both discriminatory effect and discriminatory intent." *Id.* (citing *United States* v. *Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974)) (Emphasis added). For purposes of "some evidence," the evidence in support of the asserted discriminatory effect must comprise a **credible** showing that similarly situated individuals who do not share the protected characteristic were not prosecuted. *Id.*, citing *Armstrong*, 517 U.S. at 469 (Emphasis added). "Similarly, the evidence in support of the asserted discriminatory intent must consist of a **credible** showing that the government chose to prosecute 'at least in part because of, not merely in spite of,' the defendant's protected characteristic." *Id.*, citing *Wayte*, 470 U.S. at 610 (quoting *Personnel Adm'r of Mass.* v. *Feeney*, 442 U.S. 256, 258 (1979) (Emphasis added)).

The Defendant has demonstrated neither a discriminatory effect nor a discriminatory intent, both of which are needed to successfully obtain the requested discovery. "[F]ailure on one branch dooms the discovery motion as a whole." *Lewis*, 517 F.3d at 26, citing *United States v. Bass*, 536 U.S. 862, 863-64 (2002) (per curiam). The question of discriminatory effect is addressed first.

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[6] The Defendant's lawyers correctly noted that "some" evidence is required, but failed to inform the Court what the standard for "some" evidence is.

A. The Defendant and his lawyers fail to make any kind of credible showing that similarly situated individuals who were not "outspoken Christian conservatives" were not prosecuted.

To establish a discriminatory effect, the Defendant must show that similarly situated individuals who were not outspoken Christian conservatives were not prosecuted. *Armstrong*, 517 U.S. at 470; *United States v. DeBerry*, 430 F.3d 1294 (10th Cir. Colo. 2005). In *United States v. Olvis*, 97 F.3d 739, 744 (4th Cir. 1996), the court held that "defendants are similarly situated when their circumstances present no distinguishable legitimate prosecutorial factors that might justify making different prosecutorial decisions with respect to them." *Id.* A court must examine all relevant factors and not just the other persons' "relative culpability." *Venable*, 666 F.3d at 903. Examples of such factors include:

> (1) a prosecutor's decision to offer immunity to an equally culpable defendant because that defendant may choose to cooperate and expose more criminal activity; (2) the strength of the evidence against a particular defendant; (3) the defendant's role in the crime; (4) whether the defendant is being prosecuted by state authorities; (5) the defendant's candor and willingness to plead guilty; (6) the amount of resources required to convict a defendant; (7) the extent of prosecutorial resources; (8) the potential impact of a prosecution on related investigations and prosecutions; and (9) prosecutorial priorities for addressing specific types of illegal conduct.
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> *Id.*

The "analysis of these factors is not to be conducted in a mechanistic fashion, however, because '[m]aking decisions based on the myriad of potentially relevant factors and their permutations require the very professional judgment that is conferred upon and expected from prosecutors in discharging their responsibilities.'" *Id.*, citing *Olvis*, 97 F.3d at 744. As such, the *Venable* court rejected a "narrow approach to relevant factors to be considered when deciding whether persons are similarly situated for prosecutorial decisions." *Id.*, citing *Olvis*, 97 F.3d at 744.

The Defendant provides no analysis of the foregoing or any factors and instead argues that the following provide a credible showing that similarly situated people who are not outspoken conservative Christians were not prosecuted:

1. Numerous suspects who are not outspoken conservative Christians and have defrauded victims of substantial sums have not been prosecuted by the Auditor;

2. The Auditor's refusal to contact the Defendant prior to charging him – something done for other suspects – is also an effect of anti-Christian bigotry;

(Def.'s Mot. to Compel 25, 27 (Sept. 24, 2012).) Prior to addressing these in the order the Defendant raised them, it must be noted that the Defendant alleges that his protected characteristic is "outspoken conservative Christian." While the case law rightfully gives protection to those the government pursues based on an individual's religion, it is apparent that no additional protection is afforded to a defendant simply because a defendant is "outspoken." Indeed, to what extent does outspoken mean? Is the Defendant excluding those who consider themselves liberal Christians? Or those who have no political beliefs but are nonetheless Christian? This kind of rigidity has no support in the case law and should fail on its face. And while the Defendant provided the Court with examples of his "outspokenness," he is surely one of many advocates who lobby the Legislature[7] and he certainly is not the only "outspoken conservative Christian" who is quoted in newspapers.[8] Indeed, the Defendant did not and cannot provide this Court with any kind of evidence whatsoever that shows the prosecutors or anyone in

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[7] The Defendant states he testified on seven bills that appeared before Mr. Laslovich when Mr. Laslovich was a State Senator, even receiving questions from Mr. Laslovich on one of the bills. These seven bills were a part of hundreds of bills heard by Mr. Laslovich over the course of sitting on the Senate Judiciary Committee for three legislative sessions. Even assuming, *arguendo,* that Mr. Laslovich or Ms. Lindeen knew of the Defendant's "outspoken conservative Christian" beliefs, the Defendant did not and cannot provide this Court with one shred of evidence – including from the alleged "whistleblowers" – that Mr. Laslovich and Ms. Lindeen made any kind of derogatory comment about *anyone's* religious beliefs, let alone the Defendant's.

[8] Surely, being quoted in four newspaper articles – two in the *Independent Record* and two in the *Missoulian* – over the course of two years does not amount to "extensive press coverage."

the Auditor's office saw the "extensive press coverage" the Defendant has received over the years.

The Defendant has also failed to provide evidence showing that people who are not outspoken conservative Christians were not prosecuted by the Auditor's office.

1. The Defendant has not made a credible showing that the State chose not to prosecute any individual specifically because he or she was not an "outspoken conservative Christian."

Of the many people the Auditor's office has investigated or prosecuted over the course of the years, the Defendant provides the Court with four people who were not prosecuted because, according to the Defendant, they were not "outspoken conservative Christians." Indeed, they all "tend[ed] to receive civil penalties (or none at all)." (Def.'s Mot. at 25.) Each person is addressed in the order raised by the Defendant.

Nick Cladis, a "very active" Christian, was a former partner of a person who was charged by the United States Attorney's office and ultimately sentenced to federal prison. Exhibit M Affidavit of Nicholas Cladis, ¶¶ 11-12; Exhibit I Depo. Roberta Cross Guns 101:6-11. After an extensive investigation into Mr. Cladis, the FBI decided not to pursue the same charges against him. Exhibit M Affidavit of Nicholas Cladis, ¶ 5. Even Ms. Cross Guns testified that the federal government was free to pursue Mr. Cladis regardless of what the Auditor's office did. Exhibit I Depo. Roberta Cross Guns 101:12-15. There is no evidence whatsoever that shows that the prosecutors, the investigators, or anyone at the Auditor's office did not criminally prosecute Mr. Cladis because he was not an "outspoken conservative Christian."

The same goes for Daniel Two Feathers. Ms. Cross Guns handled the administrative proceedings against Daniel Two Feathers, while the United States Attorney's office prosecuted him criminally. *Id.* 42:12-25. Tellingly, when the Defendant's lawyer asked Ms. Cross Guns

why Ms. Egan did not pursue criminal action against Mr. Two Feathers, her response was that "[Ms. Egan] was mad at the feds. That was her biggest reason. She was mad at them." *Id.* at 43:1-5. Even the Defendant's own alleged "whistleblower" did not say that Ms. Egan did not pursue Mr. Two Feathers because he was not an "outspoken conservative Christian." Accordingly, the Defendant did not and cannot provide this Court with any kind of evidence whatsoever that shows that the prosecutors, the investigators, or anyone at the Auditor's office did not criminally prosecute Mr. Two Feathers because he was not an "outspoken conservative Christian."

Rick Young was also prosecuted criminally by the United States Attorney's office. *Id.* at 47:21-48:7. Ms. Cross Guns testified that he was "pretty crazy" and "just nuts." *Id.* at 48:2-5. Allegedly, according to Ms. Cross Guns, the Auditor's office did not do anything with him because "it was not interesting enough to [Ms. Egan]." *Id.* at 48:8-9. Again, nothing was said regarding Mr. Young's religious beliefs. Accordingly, the Defendant did not and cannot provide this Court with any kind of evidence whatsoever that shows that the prosecutors, the investigators, or anyone at the Auditor's office did not criminally prosecute Mr. Young because he was not an "outspoken conservative Christian."

Finally, Bill Nooney[9] is still under investigation by the Auditor's office, so no decision has been made as to whether he will be prosecuted criminally or administratively. Exhibit G Depo. Lynne Egan 116:2-117:7. Even the alleged "whistleblowers" testified that they did not know the status of Mr. Nooney's case. Exhibit I Depo. Roberta Cross Guns 107:21-22; Exhibit H Depo. Alan Ludwig 192:16-18. The Defendant and his lawyers, citing Mr. Ludwig's

[9] Because Mr. Nooney is still under investigation, his identity and documents relating to the investigation constitute confidential criminal justice information under Mont. Code Ann. § 44-5-303 (2011). That confidentiality has already been breached, however, by the alleged "whistleblowers" when they freely discussed the investigation in their depositions.

testimony, nevertheless state that "[f]ederal officials are concerned about an improper relationship between Nooney and the Auditor's office." (Def.'s Mot. at 16.)

But John Nielsen, a Special Agent for the Division of Criminal Investigation of the Internal Revenue Service (IRS), and the person Mr. Ludwig alluded to in his deposition, stated that he has never expressed "concerns about whether there was an improper relationship between Mr. Nooney and the people at the Auditor's office." Exhibit O Affidavit of John Nielsen, ¶¶ 1, 10. Special Agent Nielsen, moreover, stated that in none of his conversations with Mr. Ludwig did he express "concerns about whether there were improper actions that resulted from a relationship between Mr. Nooney and the Auditor's office." *Id.* at ¶ 11. At the very least, Mr. Nielsen's statements call into question the credibility and motivations of Mr. Ludwig, but more importantly, they show that the Defendant's allegations of impropriety have no merit. Again, the Defendant did not and cannot provide this Court with any kind of evidence whatsoever that shows that the prosecutors, the investigators, or anyone at the Auditor's office did not (or will not) criminally prosecute Mr. Nooney because he was/is not an "outspoken conservative Christian."

If the Defendant believes these four individuals are "the tip of the iceberg," then no iceberg exists because there has not even been a showing – let alone a credible showing – that these four individuals were not prosecuted because they were not "outspoken conservative Christians." (Def.'s Mot. at 26.) The Defendant has failed to produce any evidence making a credible showing that he was similarly situated to the above individuals who were not prosecuted criminally by the Auditor's office. Indeed, he did not and cannot show that he and the other four present no distinguishable legitimate prosecutorial factors that might justify making different prosecutorial decisions with respect to them. *See Olvis*, 97 F.3d at 744.

Certainly, distinguishable legitimate prosecutorial factors existed with regard to Mr. Cladis such as his level of cooperation, the strength of the evidence against him (the FBI didn't think enough existed to prosecute him criminally), his role in his partner's crime, and his candor, among others. The same goes for Mr. Two Feathers and Mr. Young, such as the fact that they were going to be prosecuted by the federal authorities, the limited extent of prosecutorial resources, the amount of resources required to convict them, the potential impact of a prosecution on other investigations and prosecutions, and prosecutorial priorities. As for Mr. Nooney, most of the *Olvis* and *Venable* factors are present, such as the strength of the evidence against him, whether he is going to be prosecuted by the federal authorities, his candor and willingness to plead guilty, and the resources that will be affected by pursuing him. Simply put, all these individuals are distinguishable from one another, which prevents the Defendant from establishing that they are similarly situated.

Case law, moreover, supports the State's position. In *DeBerry*, *supra*, the defendants did not produce evidence that similarly situated individuals of another race were not prosecuted. *DeBerry*, 430 F.3d at1301. The African American defendants' alleged assault differed in a significant respect from others in that it was captured on videotape, whereas a stabbing alleged to have been committed by Native Americans occurred inside a cell, outside the range of video cameras. *Id.* The court held that this distinction in the evidence available to the prosecutors justified their delay in charging the Native Americans. *Id.* These additional hurdles required of the prosecution were sufficient to deny the Defendants' motion for obtaining discovery showing selective prosecution. *Id.*

Similarly, in *Lewis*, *supra*, the court stated that "[a] similarly situated offender is one outside the protected class who has committed roughly the same crime under roughly the same

circumstances but against whom the law has not been enforced." *Lewis*, 517 F.3d at 27. The court considered material factors such as the comparability of the crimes, similarities in which the crimes were committed, equivalency of the evidence, and the efficacy of the prosecution as a deterrent. *Id.* Ultimately, there was no indication that any similarly situated person of a different race escaped prosecution and the court upheld the district court's denial of the defendant's motion. *Id.*

The above cases are harmonious with this one. The factors surrounding each of the individuals the Defendant identifies are different. And the Defendant has not provided any evidence that any of the other four individuals committed roughly the same crime under roughly the same circumstances. This, combined with his failure to provide any credible showing that the four individuals were not prosecuted because they were not "outspoken conservative Christians," is fatal to the Defendant's arguments.

2. The Defendant also has not made any showing that the Auditor's office contacts people who are not "outspoken conservative Christians" prior to prosecuting them.

The Defendant states that the Auditor's office has a "policy" of sending "come-clean" letters to suspects prior to charging them. (Def.'s Mot. at 27.) The Defendant misstates the record. See Exhibit A. Indeed, Patrick Navarro, an assistant examiner in the Auditor's office, answered "yes" when asked if it was standard operating procedure to send "come-clean" letters even though nothing was written down. Exhibit L Depo. Patrick Navarro 36:6-9. But he also testified that he, personally, does not send a come clean letter to every single company. *Id.* at 35:9-11. Mr. Navarro has only been an assistant examiner for about 1 ½ years, does not investigate cases, but instead assists in the examination of broker-dealer firms and investment advisory firms registered in Montana. *Id.* at 6:18-20; Exhibit G Depo. Lynne Egan 127:2-8.

Lynne Egan, who is Mr. Navarro's supervisor and who has been with the Auditor's office for over 18 years, testified that sending a come-clean letter is done on a "case-by-case basis" and is only "one of the ways that we investigate." Exhibit G Depo. Lynne Egan 16:05-25; 127:15-25.

Mr. Navarro's testimony is inconsistent at best, he has limited experience with securities regulation, and his supervisor and long-standing Auditor's office employee testified that come-clean letters are sent on a case-by-case basis. Importantly, even assuming *arguendo* that the Auditor's office did have a policy of sending come-clean letters, the Defendant provides absolutely no evidence to this Court showing that similarly situated individuals who were not "outspoken conservative Christians" did receive come-clean letters prior to being charged or that other "outspoken conservative Christians" did not receive come-clean letters. He only speculates and hypothesizes, which is not enough to establish any kind of discriminatory effect whatsoever.

In his reply, the Defendant will likely argue that the evidence he is requesting be compelled will likely show a discriminatory effect. In other words, once he examines all of the cases the Auditor's office has handled since 2006, he will presumably be able to provide at least some evidence of discriminatory effect. This argument, though, has already been previously rejected.

In *United States v. Thorpe*, the defendant filed a discovery motion seeking evidence from the government of selective prosecution. *Thorpe*, 471 F.3d 652, 654 (6th Cir. 2006). The defendant argued that it was "unfair" to require him to make a showing of discrimination without the benefit of the discovery requested. *Thorpe*, 471 F.3d at 662. The court cited *Armstrong*, saying that the United States Supreme Court was "well aware" of this argument and "yet still found the 'rigorous' standard for discovery to be justified." *Id.* at 663. Additionally, the court noted, the United States Supreme Court "summarily and unequivocally" dispelled any notion

that it would reduce the threshold for discovery set forth in *Armstrong*. *Id.*, citing *United States v. Bass*, 536 U.S. 862, 863-64 (2002). The Court in *United States v. Bass* did not want to "threaten the 'performance of a core executive constitutional function'" and, therefore, reversed the circuit court's decision granting a discovery motion for selective prosecution. *Id.*

It is no different here. Because the Defendant did not and cannot provide this Court with any evidence showing that other "outspoken conservative Christians" did not receive come-clean letters or that those who were not "outspoken conservative Christians" did receive come clean letters, his argument fails. He has no legal basis, moreover, to argue that this Court must grant his motion to enable him to find evidence to make such an argument, as the United States Supreme Court affirmatively rejected this in *Bass*. The Defendant, therefore, has not overcome the "rigorous" standard of dispelling the "presumption" that prosecutors here have not violated equal protection. *Armstrong*, 517 U.S. at 463-64, 468.

Because the Defendant cannot show discriminatory effect, the Court need not go any further and the Defendant's motion should be denied. In the unlikely event the Court finds that the Defendant has overcome his burden showing discriminatory effect, he has failed to show discriminatory intent.

B. The Defendant and his lawyers fail to make any kind of credible showing of evidence that proves discriminatory intent by the State's prosecutors.

In order to show discriminatory intent, the decision to prosecute must be "invidious or in bad faith." *Venable*, 666 F.3d at 903, citing *Wayte*, 470 U.S. at 610. Similar to discriminatory effect, the evidence in support of the asserted discriminatory intent must consist of a **credible** showing that the State chose to prosecute "at least in part 'because of,' not merely in spite of," the defendant's protected characteristic. *Wayte*, 470 U.S. at 610 (quoting *Personnel Adm'r of Mass.* v. *Feeney*, 442 U.S. 256, 258 (1979)).

The Defendant cites the following as the "truckload" of evidence of discriminatory intent by the State:

1. The routine use of anti-Christian epithets by decision makers in the Auditor's office;
2. Harassment of employees in the Auditor's office who are devout Christians, which is indicative of biased charging of suspects who are devout Christians;
3. Decision makers in the Auditor's office knew of the Defendant's outspoken conservative Christian beliefs;
4. The Auditor's reliance upon fabricated evidence in charging the Defendant;
5. Charging the Defendant with six felonies despite lacking evidence that the Defendant took G.S.'s money;
6. The Auditor's retaliation against the Defendant for publicly criticizing her;
7. Mr. Laslovich's need to placate Democratic primary voters provided an additional motive to prosecute a prominent Christian "whack job."

(Def.'s Mot. at 18-24.)

Prior to addressing each argument in the order presented by the Defendant, it must be reaffirmed that the decision to prosecute rests with the "broad discretion" of the prosecutor. *Lemmon*, 214 Mont. at 126, 692 P.2d at 458. "Prosecutor means an elected or appointed attorney who is vested by law with the power to initiate and carry out criminal proceedings on behalf of the state or political subdivision." Mont. Code Ann. § 46-1-202(22) (2011). Based on the plain wording of the statute, a prosecutor is not an investigator. It is in this context that the Defendant's arguments are examined.

1. <u>The Defendant has not made any credible showing that the prosecutors showed discriminatory intent by routinely using "anti-Christian epithets."</u>

The Defendant did not and cannot cite to any evidence showing that Mr. Laslovich, one of the prosecutors in this matter, routinely – or even one time – made "anti-Christian epithets." In fact, Ms. Cross Guns testified that Mr. Laslovich was a "practicing Christian." Exhibit I Depo. Roberta Cross Guns 60:3-9. And even though she did not talk with Mr. O'Neil, the other prosecutor, much, Ms. Cross Guns heard him call "right wing Christians . . . whack jobs"

"maybe two or three times." *Id.* at 59:6-24. Mr. Ludwig testified that he merely heard Mr. O'Neil make comments about pastors proselytizing, although he "didn't know [Mr. O'Neil's] attitudes towards Christians in general." Exhibit H Depo. Alan Ludwig at 89:15-90:15.

The Defendant and his lawyers go to great lengths in discussing Ms. Egan's alleged use of "anti-Christian epithets" and the "enormous influence" she has on the "inexperience[d]" prosecutors. Def.'s Mot. at 19. Even assuming, *arguendo*, the Defendant is correct, he still nevertheless has failed to show that he was charged criminally "at least in part because of" his being an "outspoken conservative Christian." *Wayte*, *supra*, 470 U.S. at 610 (quoting *Personnel Adm'r of Mass.* v. *Feeney*, 442 U.S. 256, 258 (1979)).

To be sure, the Defendant cannot show that either prosecutor made any kind of "anti-Christian epithet" against the Defendant. Additionally, Ms. Egan never made any comments about the Defendant's religious beliefs in the presence of Ms. Cross Guns, as Ms. Cross Guns' testimony of Ms. Egan's statements was what was "relayed" to her. Exhibit I Depo. Roberta Cross Guns 54:15-18; 55:10-16.

Ultimately, nothing can be shown that the prosecutors had discriminatory intent when they filed charges against the Defendant. On this alone, the Defendant's argument must be rejected because the filing of charges is a prosecutorial decision, not one made by the investigator. The prosecutors sign the pleadings, not the investigator. And the facts of this charging decision show that the prosecutors did not blindly follow Ms. Egan. *Cf.* Information and Amended Information and Exhibit F Bates 1-8; *See* Exhibit H Depo. Ludwig 139:22-140:5 (admitting he does not know if Ms. Egan wrote the State's Motion for Leave to File Information and Affidavit in Support (Sept. 25, 2011)). The prosecutors' decision to charge the Defendant is

entitled to a "presumption" that it did not violate the Defendant's equal protection rights. *Armstrong*, 517 U.S. at 468. Quite simply, that presumption has not been overcome by the Defendant.

Even if the Court were to consider the allegations made against Ms. Egan, the Defendant fails to demonstrate a substantive link between her alleged comments and the Defendant's charges, as is necessary to prove discriminatory intent. Case law is instructive on this point. In *Venable*, *supra*, the defendant argued that he was prosecuted due to his race and provided statistical evidence showing 87 percent of firearms prosecutions were brought against black defendants. *Venable*, 666 F.3d at 898-99. The court rejected his argument because there was no "evidence about the number of blacks who were actually committing firearms offenses or whether a greater percentage of whites could have been prosecuted for such crimes. It does not even provide any evidence regarding the proportion of blacks residing within the relevant geographical area." *Id.* at 903. This decision was consistent with the court's decision in *Olvis*, *supra*, which held that a study submitted by the defendant in support of his discovery motion "provide[d] no statistical evidence on the number of blacks who were actually committing crack cocaine offenses or whether a greater percentage of whites could have been prosecuted for such crimes." *Olvis*, 97 F.3d at 745.

Here, the Defendant has not even submitted a study or any kind of statistical evidence whatsoever showing that people who are not "outspoken conservative Christians" could have been prosecuted for crimes similar to the Defendant's. The only evidence the Defendant can point to is innuendo about the Boy Scouts, Christians in general, and Ms. Egan's volunteerism on political campaigns. The Defendant nevertheless argues that this is enough to "reasonably

[infer]" that charging decisions against "conservative Christians"[10] are "[tainted]." (Def.'s Mot. at 20.) But this is not the "rigorous" standard outlined by *Armstrong*. *Armstrong*, 517 U.S. at 468. His argument, therefore, must be rejected.

2. The Defendant has not made any credible showing that the State harasses its Christian employees and as such engages in "biased charging of suspects who are 'devout Christians.'"[11]

Again, the Defendant argues that "it is not difficult to infer" that people who are "devout Christians" face discrimination because the "decision makers in the Auditor's office" "routinely target employees who are devout Christians." (Def.'s Mot. at 20.) Even assuming that the Defendant had evidence showing this, which he does not, he nonetheless still fails to overcome the "rigorous" standard set by *Armstrong*. *Armstrong*, 517 U.S. at 468. In fact, the Defendant's example of an Auditor's office employee who has been routinely harassed because she is a devout Christian disagrees with the misrepresentation that the Auditor's office "routinely harasses employees who are devout Christians." Exhibit N Affidavit of Tari Nyland, ¶ 12. Clearly, the Defendant and his lawyers' arguments have no merit.

The Defendant simply fails to provide any evidence – let alone a credible showing – that proves that the State charged the Defendant "at least in part because of" the Defendant being a "devout Christian." *Wayte supra*, 470 U.S. at 610 (quoting *Personnel Adm'r of Mass.* v. *Feeney*, 442 U.S. 256, 258 (1979)). Not even the alleged "whistleblowers" could testify that the Defendant was charged because he was a "devout Christian." And as Ms. Cross Guns' own testimony demonstrates, religious bias played no part in the State's non-prosecutions of individuals such as Mr. Cladis and Mr. Two Feathers. While the Defendant relies on office

[10] The Defendant and his lawyers dropped the word "outspoken."
[11] The Defendant and his lawyers dropped the words "outspoken conservative" and inserted "devout."

gossip and hearsay to infer discriminatory intent, his witness' personal prosecutorial experience in the Auditor's Office necessitates the opposite conclusion.

3. The Defendant has not made any credible showing that decision makers in the Auditor's office knowing of the Defendant's outspoken conservative Christian beliefs proves discriminatory intent.

Under *Armstrong*, it is not enough simply to say that because the Auditor's office knew of the Defendant's Christian beliefs, then he is being selectively prosecuted. It is self-evident that someone who is a Pastor at a church named Big Sky Christian Center is a Christian. The victim's relationship with the Defendant, moreover, was based on shared religious beliefs with the Defendant and he was lured to invest because of the Defendant's offer to invest in the "Lord's work." Exhibit F, Bates 48. Quite simply, for the State to avoid exposure to the Defendant's religious beliefs would constitute a failure to investigate the basic facts of the case, which is exactly what the Defendant is alleging in another pleading. (See Def.'s Ans. Br. to State's Mot. in Limine to Prohibit use of Depos. and Video Conference Test. (Sept. 28, 2012).) The Defendant cannot have it both ways. He cannot assert discriminatory intent based on the State's knowledge of the Defendant's beliefs while at the same time accusing the State of an insufficient investigation.

Importantly, here the Defendant concedes that the *prosecutor*s charged him – and not the *investigator* (i.e. Ms. Egan). (Def.'s Mot. at 20.) The only evidence the Defendant offers in support of his argument that the prosecutors knew of the Defendant's belief prior to charging him was that Mr. Laslovich heard the Defendant testify before the Senate Judiciary Committee from 2005 to 2010 and even asked the Defendant some questions, and that the Defendant has been named in four newspaper articles in 2010 and 2011. (Def.'s Mot. at 21.) Assuming the Defendant is correct, the Defendant still fails to provide this Court with any credible showing

that he was charged criminally "at least in part" because of his "outspoken conservative Christian" beliefs. *Wayte supra*, 470 U.S. at 610 (quoting *Personnel Adm'r of Mass.* v. *Feeney*, 442 U.S. 256, 258 (1979)). In fact, the Defendant does not even try to make inferences here. Absent any kind of credible showing (or any showing at all) that the prosecutors charged him at least in part *because* of his Christian beliefs, his argument has no legal support and therefore must be rejected by the Court.

4. The Defendant has not made any credible showing that the State relied upon "fabricated evidence" and, therefore, the Defendant cannot prove discriminatory intent.

The Defendant argues that Ms. Egan fabricated evidence and included materially false statements in her report, both of which are evidence of bias. (Def.'s Mot. at 21.) For example, Ms. Egan spoke with Noe Sanchez on the phone and prepared a contact report summarizing the conversation, some of which Mr. Sanchez contradicts in an Affidavit. Importantly, the conversation was not a part of Ms. Egan's investigation report nor was it used by the prosecutors in charging the Defendant. The conversation, moreover, is regarding Jeb Bryant, the co-defendant, and did not affect the charging of the Defendant in any way. And the Defendant has not pointed to any case law that shows that this question of fact is evidence of bias. This is as much a question of Mr. Sanchez's sincerity as anything. A mere question of fact speaking to the credibility of a witness is grossly insufficient to demonstrate bias. It is the province of the jury to assess credibility.

The Defendant also disputes that both he and Mr. Bryant gave the victim wiring instructions, arguing instead that it was just Mr. Bryant. Indeed, this is consistent with what the prosecutors alleged in the Affidavit for Probable Cause and the Information. Ironically, the Defendant's attempt to show Ms. Egan's initial report (dated months prior to the Information

being filed) referring to both pastors only confirms (1) the Auditor's office's ongoing commitment to ensuring evidentiary integrity, and (2) that the Defendant's assertion of Ms. Egan's influence in charging defendants, including the Defendant, is overstated.

Finally, the Defendant also discusses the incorrect criminal history of Mr. Bryant that was included as part of Ms. Egan's investigation report. According to the Defendant and his lawyers, this shows Ms. Egan's "reckless (or deliberate) disregard for the truth." (Def.'s Mot. at 22.) But a complete review of the record shows that Deputy Smith of the RCSO made a mistake when he initially ran Mr. Bryant's criminal history and Ms. Egan, who simply relied on what was provided to her by the RCSO, did not know it was the wrong criminal history when she completed her report. In fact, no one at the State knew of the mistake until Deputy Smith's deposition. As soon as this was realized, Deputy Smith ran a new criminal history background search on Mr. Bryant. Most importantly, though, is the fact that the Defendant was not charged for failing to disclose Mr. Bryant's criminal history to the victim.

Therefore, none of the foregoing shows evidence being fabricated to charge the Defendant. In fact, all three of the Defendant's arguments relate to Mr. Bryant and not himself. The Defendant argues that "a reasonable person could view [the foregoing] as purposeful attempts to secure a criminal conviction against a 'whack job' conservative Christian." *Id.* Again, no law is cited by the Defendant in support of his argument.

The foregoing does not show evidence being fabricated. Rather, a person interviewed by Ms. Egan recalls what he said differently than Ms. Egan's recollection, the prosecutors appropriately attributed the wiring instructions to Mr. Bryant, and the RCSO acknowledged that they made a mistake regarding Mr. Bryant's criminal history. None of this has anything to do with the charging decision relative to the Defendant. Absent any kind of credible showing that

proves that the State charged the Defendant "at least in part because of" the Defendant being a "devout Christian" or "outspoken conservative Christian," this Court cannot find discriminatory intent. *Wayte supra*, 470 U.S. at 610 (quoting *Personnel Adm'r of Mass.* v. *Feeney*, 442 U.S. 256, 258 (1979)).

5. The Defendant has not made any credible showing that the State lacked evidence in charging him with six felonies and, therefore, the Defendant cannot prove discriminatory intent.

The Defendant argues that because the State lacked evidence in charging him with six felonies, he has shown discriminatory intent. (Def.'s Mot. at 22-23.) First, the Defendant's argument is a question of fact for the jury to decide. Secondly, he completely fails to demonstrate how he was charged differently than others who were similarly situated to him, only speculating that charging him with six felonies was "likely" the result of a biased charging decision. (Def.'s Mot. at 23.) "Likely" is not the standard. Again, he must credibly show that the State charged the Defendant "at least in part because of" the Defendant being an "outspoken conservative Christian" or "devout Christian." *Wayte supra*, 470 U.S. at 610 (quoting *Personnel Adm'r of Mass.* v. *Feeney*, 442 U.S. 256, 258 (1979)). He simply has not met his burden.

6. The Defendant has not made any credible showing that the Auditor retaliated against him for publicly criticizing her, and therefore, the Defendant cannot prove discriminatory intent.

The Defendant argues, without evidentiary support,[12] that the Auditor retaliated against him after he went on a radio program after he was charged and made statements about the strength of the State's case. (Def.'s Mot. at 23.) Specifically, he argues that the State not allowing the Defendant to attend interviews and depositions "exemplifies [Ms. Lindeen's] policy of punishing defendants for engaging in protected speech." *Id.* He also states, again without

[12] See Exhibit A.

evidentiary support,[13] that the prosecutors added a seventh charge that was not made in "good faith," but instead as a "vindictive response" because the office does not "brook[]" criticism of its charging decisions. *Id.* at 23-24.

The facts of the case contradict the Defendant's baseless accusations, especially in regard to the "retaliatory" charging. The Defendant claims the seventh charge included in the Amended Information was a result of retaliation for the Defendant's radio interview made after the initial charging. In actuality, the seventh "retaliatory" charge was founded upon complaints made by witnesses who approached the State after hearing of the Defendant's other charges. (Mot. Amd. Info. at 6.) It was, therefore, impossible for the State to include this charge in its Information. Once it heard these complaints, it was the State's prosecutorial prerogative to choose not to ignore evidence of further victimization. Additionally, the Defendant baldly asserts that the State's decision not to include Himes at depositions constitutes retaliation. Yet he does not even attempt to demonstrate a link between this pre-trial strategy and the Defendant's prior statements. While the Defendant's speculation and innuendo may make for good rhetoric, they do not meet the "rigorous" standard set by *Armstrong*. *Armstrong*, 517 U.S. at 468. Without any evidence showing that the State retaliated against the Defendant "at least in part" because of his religious beliefs,[14] the Defendant cannot prove discriminatory intent.

7. The Defendant has not made any credible showing that the State filed the charges to placate Democratic primary voters and, therefore, the Defendant cannot prove discriminatory intent.

The Defendant argues that Mr. Laslovich was "in need of prey in order to impress voters in a Democratic Party primary,"[15] and, therefore, charged the Defendant to "burnish[]" his

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[13] See Exhibit A.
[14] The Defendant also raises "protected speech" for the first time, but does not elaborate.
[15] See Exhibit A.

credentials with voters. (Def.'s Mot. at 24.) He only cites the Court to the testimony of Ms. Cross Guns, who said in her "opinion" that Mr. Laslovich "was looking for a pretty high profile criminal case" and "there[] [was] no reason for him not to ask for my help in prosecuting these cases." Exhibit I Depo. Roberta Cross Guns 69:2-15. No law was cited by the Defendant.

Ms. Cross Guns specifically mentioned the prosecution of "Art Heffelfinger" and "Don C[h]ouinard," and "there[] [was] no reason for [Mr. Laslovich] not to ask me to sit second chair." *Id.* at 69:7-12. She also testified that in her 12 years at the Auditor's office, she had not won one jury trial. *Id.* at 97:14-99:13. Ms. Cross Guns testified, moreover, that "there are things about Mr. Laslovich that I really like and that I really respect" such as when something goes wrong, "he's willing to say, 'I shouldn't have done that.'" *Id.* at 69:20-70:2.

Importantly, Ms. Cross Guns acknowledged that all of this was her opinion. *Id.* at 69:15. Opinion and conjecture are not enough to meet *Armstrong's* "rigorous" standard. *Armstrong*, 517 U.S. at 468. The Defendant did not and cannot, nor can Ms. Cross Guns, provide this Court with any evidence that shows Mr. Laslovich filed charges against the Defendant to placate Democratic primary voters. Even though the Defendant and his lawyers speculate and make accusations without evidentiary support, it is not enough to make a credible showing that proves that the State charged the Defendant "at least in part because of" the Defendant being a "devout Christian" or a "prominent Christian 'whack job'" who needed to be prosecuted in order to placate Democratic primary voters. *Wayte supra*, 470 U.S. at 610 (quoting *Personnel Adm'r of Mass.* v. *Feeney*, 442 U.S. 256, 258 (1979)).

Ultimately, none of the Defendant's arguments make the credible showing necessary under the "rigorous" standard established in *Armstrong* to prove discriminatory intent. *Armstrong*, 517 U.S. at 468. The presumption that the prosecutors did not violate the

Defendant's equal protection rights has not been overcome. Because the Defendant cannot prove discriminatory effect or discriminatory intent, this Court must reject the Defendant's motion.

II. THE DESIGNATION OF LYNNE EGAN AS AN EXPERT WITNESS DOES NOT PROVIDE THIS COURT WITH A BASIS TO GRANT THE DEFENDANT'S MOTION.

The Defendant argues that designating Lynne Egan as an expert provides a separate basis for the Court to grant the Defendant's motion to compel production of selective prosecution evidence. The Defendant did not and cannot provide the Court with any case law that prevents an investigator from serving as an expert witness, a fact made more clear in the Defendant's Motion to Exclude Expert Testimony of Lynne Egan. The Defendant instead argues that Ms. Egan is biased due to her "anti-Christian bigotry." (Def.'s Mot. at 29.) This argument, though, has previously been effectively shown to have no merit. And under the "rigorous standard" articulated by *Armstrong*, in order for the Court to grant a motion for discovery of selective prosecution, the Defendant must credibly show both discriminatory effect and discriminatory intent. He has not done so here. Indeed, while the Defendant makes assumptions and speculates about Ms. Egan's "anti-Christian bigotry," he offers no evidence to make a credible showing that Ms. Egan investigated the Defendant "at least in part because of" the Defendant being a "devout Christian" or a "prominent Christian 'whack job.'" *Wayte supra*, 470 U.S. at 610 (quoting *Personnel Adm'r of Mass.* v. *Feeney*, 442 U.S. 256, 258 (1979)).

Additionally, the Defendant argues that he is entitled to the evidence based on *United States v. Brady*, 373 U.S. 83, 87 (1963). Under *Brady*, the Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is **material** either to guilt or punishment." *Brady*, 373 U.S. 83, 87 (1963) (Emphasis added). Subsequently, the Court in *United States v. Bagley* adopted a materiality standard:

> The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.
>
> 473 U.S. 667, 682 (1985).

Emphasizing the limited scope of *Brady*, the Court noted that "[a]n interpretation of Brady to create a broad, constitutionally required right of discovery 'would entirely alter the character and balance of our present systems of criminal justice.'" *Bagley*, 473 U.S. at 676, citing *Giles v. Maryland*, 386 U.S. 66, 117 (1967) (dissenting opinion).

The Defendant argues that because evidence of Ms. Egan's allegedly "anti-Christian bigotry" is favorable to him, then it is "subject to mandatory disclosure as *Brady* evidence." (Def.'s Mot. at 29.) This argument grossly mischaracterizes *Brady* and its progeny. The argument implies a positive right of the Defendant to demand and receive, pre-trial, documents based solely upon a suspicion of their possible contents. This conception of *Brady* is fallacious on two levels. First, *Brady* ramifications apply after suppressed evidence is discovered, not before it is even determined to exist: "The rule of *Brady v. Maryland* . . . arguably applies in three quite different situations. Each involves the discovery, after trial, of information which had been known to the prosecution but unknown to the defense." *United States v. Agurs*, 427 U.S. 97, 103 (1976). This is evinced by the very nature of the *Brady* test, which addresses actual failures to disclose actual evidence. *State v. Ellison*, 2012 MT 50, ¶ 16, 364 Mont. 276, 272 P.3d 646.[16]

[16] "There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *State v. Ellison*, 2012 MT 50, ¶ 16, 364 Mont. 276, 272 P.3d 646 (citing *State v. St. Dennis*, 2010 MT 229, ¶ 47, 358 Mont. 88, 244 P.3d 292.

Second, *Brady* obligates the State; it does not entitle the Defendant. *Brady* requires the State to disclose material evidence favorable to the accused, 373 U.S. at 87; it does not grant the Defendant the positive right to sort through the State's files in search of such evidence, *see Bagley*, 473 U.S. at 675 ("Thus, the prosecutor is not required to deliver his entire file to defense counsel . . . ."). The Defendant's interpretation of *Brady* would "create a broad, constitutionally required right of discovery" of the type rejected by *Bagley*. 473 U.S. at 682. In short, *Brady* doesn't allow fishing expeditions.

Moreover, even if such a right existed, the Defendant cannot clear the hurdle of materiality. To justify his *Brady* demand, the Defendant again references Egan's "anti-Christian bigotry" as a possible source of impeachment. (Def.'s Mot. at 29.) Yet he cannot show that the documents he seeks (e.g., "documents from her employee file as well as information pertaining to her compensation as an expert" (Def.'s Mot. at 30.)) contain "anti-Christian" substance. The Defendant is, therefore, caught in a catch-22: he must prove the State holds material evidence in order to implicate *Brady*, yet he seeks to use *Brady* in an attempt to prove that the demanded evidence is material. This application of *Brady* perverts the rule. Put bluntly, the Defendant cannot use *Brady* to obtain evidence in order to prove that evidence is subject to *Brady*.

The Defendant fails to recognize that he cannot proactively invoke *Brady* to obtain evidence in this case. Moreover, the Defendant cannot use *Brady* to obtain evidence he claims would justify the use of *Brady*. For these reasons, *Brady* is inapplicable.

III. THE DEFENDANT IS NOT ENTITLED TO THE RELIEF REQUESTED

Ultimately, in his Motion to Compel, the Defendant requests that the Court order the State to provide the following discovery:

1. Evidence pertaining to the Auditor's treatment of similarly situated suspects who are not outspoken conservative Christians.

2. Contact information pertaining to former employees.

3. Lynne Egan's employee files.

For the aforementioned reasons and analysis, the Defendant is not entitled to evidence pertaining to the Auditor's treatment of similarly situated suspects who are not outspoken conservative Christian because he has not met his "rigorous" burden under *Armstrong*. *Armstrong*, 517 U.S. at 468.

Similarly, as for contact information pertaining to former employees and Ms. Egan's employee files, the Defendant has also not met the "rigorous" standard in *Armstrong* for this Court to order the release of such information. *Armstrong*, 517 U.S. at 468. The Defendant speculates, once again, that "if" Ms. Egan's salary is "partly attributable to the [Auditor's office] success rate at trial,"[17] then it's a conflict the jury is entitled to hear. (Def.'s Mot. at 31-32.) As for information about former Auditor's office employees, the Defendant states that Mr. Ludwig and Ms. Cross Guns were aware "of at least some of the details" about the Defendant's case, so there is "no explanation as to why former employees would be ignorant of [the Defendant's] case" as well. (Def.'s Mot. at 31.) Additionally, Mr. Ludwig gave the Defendant's attorneys specific names of former and current employees Ms. Egan has treated "negatively," but there is absolutely no evidence the Defendant can provide that shows Ms. Egan treated the employees negatively because of the employees' respective religious beliefs. *Armstrong* supports the State's position that the Defendant is not entitled to selective prosecution evidence because one employee said a "negative" thing about another employee.

Additionally, the Defendant states that this information will be protected because he offered to enter into a protective order. (Def.'s Mot. at 32.) But just because the Defendant

[17] The Defendant and his lawyers state that "the Auditor's Office is at least partially funded by monies it receives from cases it prosecutes." See Exhibit A.

offers to enter into a protective order does not mean that he is entitled to the information. To the contrary and as demonstrated previously, because he has not met the standard articulated in *Armstrong*, he is not entitled to such information. *Armstrong*, 517 U.S. at 468. Under *Armstrong*, speculation, conspiracy theories, and mischaracterization of the evidence are not sufficient for the Court to compel the release of the requested information.

CONCLUSION

At its core, this case is about the Defendant committing crimes against another Christian. The prosecutors, using their "broad discretion," charged the Defendant with those crimes based on the evidence presented, as the foregoing reflects. The prosecutors' "broad discretion" is entitled to a presumption – a presumption which the Defendant has not overcome. The State respectfully urges the Court to deny the Defendant's motion.

DATED this 5th day of October, 2012.

By: _____
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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served on the 5th day of October, 2012, by US mail, to the following:

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